

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

JAN 11 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Telecommunications Carriers' Use of)
Customer Proprietary Network Information and)
Other Customer Information)

CC Docket No. 96-115

To: The Commission

Comments of the Yellow Pages Publishers Association in
Opposition to the Petition for Reconsideration filed by the
Association of Directory Publishers and in Support of the
Petitions for Reconsideration filed by Alltel, Bell Atlantic,
National Telephone Cooperative Association and US West

Joel Bernstein
Counsel for Yellow Pages Publishers Association
Halprin, Temple, Goodman and Maher
555 12th Street, N.W., Suite 950 North
Washington, DC 20004
(202)371-9100

January 11, 2000

FILED
JAN 11 2000

014

SUMMARY

The Yellow Pages Publishers Association ("YPPA") opposes the Petition for Reconsideration filed by the Association of Directory Publishers (ADP) and supports the Petitions for Reconsideration filed by Alltel, Bell Atlantic, National Telephone Cooperative Association (NTCA) and US West in the above-captioned proceeding.

YPPA believes that some of ADP's requests are clearly outside of Congressional intent as reflected in the statute. Others will adversely affect the operation of YPPA members' directory business and not serve the public interest. YPPA believes the Commission has made the correct decisions regarding unpublished and unlisted subscriber listing information (SLI), the treatment of competitive local exchange carrier SLI, the regulatory treatment of directory publishers, interim pricing during the pendency of a complaint, and use of the Commission's accelerated docket procedures. Each of these requests by ADP asks the Commission to go beyond the statute and impose obligations on the local exchange carrier (LEC) or its affiliates, or tilt the balance further in favor of independent directory publishers. The Commission should reject ADP's request.

The Commission should grant the petitions of Alltel, Bell Atlantic, NTCA and US West. The Commission should not mandate that contracts between a LEC and its publisher be turned over to competing publishers. The Commission's requirement is wholly unfair, outside the scope of the statute, and totally contravenes normal business practices.

The Commission also forbids a LEC from preempting sales of SLI to entities which the LEC believes will abuse the information. The Commission's procedures in this matter have the unintended consequence of threatening the privacy of all telephone subscribers.

The Commission imposes a requirement for the LEC to notify all publishers when a subscriber changes from published to non-published. This requirement is expensive, unnecessary and does not comport with standard industry practices.

Finally, the Commission has set a one-size-fits-all benchmark rate for SLI. As YPPA has contended in the past, the one-size-fits-all approach is ill-suited for this proceeding. Additionally, the Commission has used the wrong overall standard for determining price reasonableness.

YPPA asks that the Commission deny ADP's Petition for Reconsideration and grant the Petitions for Reconsideration filed by Alltel, Bell Atlantic, NTCA and US West.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. OPPOSITION TO ASSOCIATION OF DIRECTORY PUBLISHERS PETITION	2
A. Unpublished and Unlisted Subscriber Listing Information	2
B. Competitive Local Exchange Carrier Listings	3
C. Obligations and Duties of LEC Directory Publishing Affiliates	6
D. Interim Prices During the Pendency of a Complaint	7
E. Use of Accelerated Docket	7
II. SUPPORT FOR PETITIONS FILED BY ALLTEL, BELL ATLANTIC, NATIONAL TELEPHONE COOPERATIVE ASSOCIATION AND US WEST	8
A. Contracts between Carriers and Publishers	8
B. Ability to Preempt Abusive Use of SLI	9
C. Changes from Published to Unpublished	10
D. Benchmark Pricing	10
III. CONCLUSION	12

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-115
Telecommunications Act of 1996)	
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network Information and)	
Other Customer Information)	

To: The Commission

Comments of the Yellow Pages Publishers Association in
Opposition to the Petition for Reconsideration filed by the
Association of Directory Publishers and in Support of the
Petitions for Reconsideration filed by Alltel, Bell Atlantic,
National Telephone Cooperative Association and US West

The Yellow Pages Publishers Association ("YPPA") by its attorneys, hereby submits these comments in opposition to the Petition for Reconsideration filed by the Association of Directory Publishers (ADP) and in support of the Petitions for Reconsideration filed by Alltel, Bell Atlantic, National Telephone Cooperative Association (NTCA) and US West in the above-captioned proceeding. YPPA is the largest trade association representing the Yellow Pages industry in North America. YPPA members include many Yellow Pages publishers, as well as many other participants in the Yellow Pages industry. YPPA has actively participate in this proceeding on behalf of its members.

I. OPPOSITION TO ASSOCIATION OF DIRECTORY PUBLISHERS PETITION

YPPA opposes the Petition for Reconsideration filed by ADP. ADP asks the Commission to reconsider several critical issues that helped balance the Commission's decision. Several of these requests are clearly outside of Congressional intent as reflected in the plain language of the statute. Others will adversely affect the operation of YPPA members' directory business and not serve the public interest.

A. Unpublished and Unlisted Subscriber Listing Information

ADP requests that the Commission impose an affirmative obligation to require carriers to give unpublished and unlisted subscriber listing information (SLI) to independent directory publishers. In its Third Report and Order (R&O),^{1/} the Commission declined to impose such an obligation. YPPA believes the Commission correctly decided this issue.

Unlisted and unpublished numbers are not considered SLI under the statute. Specifically, the definition of SLI includes only listings which a carrier has published or accepted for publishing.^{2/} The Commission properly concluded that section 222 cannot

^{1/} In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No, 96-115, Third Report and Order, FCC 99-227 (released September 9, 1999).

^{2/} 47 U.S.C. 222(f)(3)(B).

require a carrier to provide unlisted or unpublished numbers to independent directory publishers.^{3/}

In dicta, the Commission intimated that a carrier giving unpublished and unlisted SLI to its own affiliate and not independent publishers could be a violation of the non-discrimination requirements of section 201(b) and 202(a) of the Communications Act. The fact that the Commission hinted that the non-discrimination requirements of section 201 or 202 may be implicated is wholly outside of this proceeding. The Commission could, of course, initiate a proceeding to determine whether sections 201 and 202 require carriers to provide unlisted and unpublished listing information to directory publishers.^{4/} This issue, however, was not before the Commission during the pendency of this proceeding, and therefore the Commission should not make any determination regarding the applicability of sections 201 and 202 to unpublished and unlisted listing information.

B. Competitive Local Exchange Carrier Listings

ADP asks the Commission to impose a clearinghouse function on incumbent local exchange carriers (ILECs) for competitive local exchange carrier (CLEC) listings. ADP claims that ILECs give the CLEC listing to their affiliate and therefore it is discriminatory to

^{3/} This does not prevent a carrier from voluntarily providing such listings for the sole purpose of delivering directories. There may be state privacy requirements, however, that would prevent a carrier from providing that information.

^{4/} Other issues, such as liability for publishing numbers which have been requested to be unlisted or unpublished, may be implicated in such a proceeding.

not give them to independent publishers. ADP asserts that many CLECs are incapable of providing complete, accurate SLI.

Once again, the Commission correctly ruled that CLEC listings are not the SLI of an ILEC under the definition incorporated in the statute. A directory publisher, whether independent or affiliated with a LEC, has the right to a CLEC's subscriber listing information -- directly from the CLEC -- on reasonable and nondiscriminatory terms. YPPA supports the right of all directory publishers to obtain this information from CLECs, and believes that CLECs have the obligation to provide this information in compliance with Section 222(e).

ADP's request ignores the plain words of the statute. Subscriber listing information is defined as information "identifying the listed names of subscribers of a carrier..."^{5/} Indeed, the statute requires that telecommunications carriers need only provide the listing information of their own subscribers.

ADP claims that a carrier violates the non-discrimination requirements of section 201(b) and 202(a) if the carrier gives CLEC SLI to its directory publishing affiliate and not to unaffiliated directory publishers. ADP ignores that fact that Bell operating companies (BOCs), under section 271(c)(2)(B)(viii), are required to offer the CLEC an opportunity to list the CLEC customers in BOC's directory. This is entirely up to the CLEC in the

^{5/} 47 U.S.C. 222(f)(3)(A) (emphasis added).

interconnection agreement. If the CLEC does not wish to have its customers listed pursuant to an interconnection agreement, the CLEC does not have to exercise this right.^{6/}

One of the goals of directory publishing is to have the most complete and up-to-date information available. The most complete and up-to-date source of CLEC subscriber listing information is the CLEC itself.^{7/}

ADP also claims that some CLECs are unable to respond to a directory publisher's request for listing information. Incompetence on the CLEC's part should not translate into an affirmative obligation on the ILEC.

Finally, the arrangements between the ILEC and CLEC are often governed by contract and state law, and a Commission requirement that ILECs redistribute CLEC listings could violate both state law and existing contracts.

Independent directory publishers are not barred from obtaining CLEC listings. In fact, all directory publishers have the right to obtain CLEC listings. That right, however, only applies to obtaining the listings from the CLEC itself.

^{6/} If a CLEC does not demand to have its customers listed, the affiliated directory publisher can still request the listings pursuant to section 222(e).

^{7/} In the past, ADP has claimed that requiring CLECs to respond to subscriber list inquiries will put an undue burden on the CLEC. It appears to YPPA that ILECs are required to expend resources servicing directory listing requests, so the principles of non-discrimination and competition would dictate that CLECs should also be required to provide this service directly to independent publishers.

C. Obligations and Duties of LEC Directory Publishing Affiliates

ADP also asks the Commission to ensure that carriers do not use their unregulated directory publishing affiliates to avoid fulfilling the obligations of section 222(e).

A LEC's directory publishing affiliate is not subject to the section 222(e) provisions. The statute allows independent directory publishers to obtain SLI from the LECs at the reasonable and non-discriminatory prices. The statute does not grant independent directory publishers the right to purchase value-added listings or information derived from that SLI from other directory publishers. Affiliated directory publishers and unaffiliated directory publishers should be able to obtain the same or similar SLI from a LEC for the same or similar price.^{8/}

ADP complains that when a particular independent publisher requested SLI pursuant to section 222(e) from a LEC affiliated directory publisher, the independent publisher was directed to contact the LEC. As noted above, the statute does not require any publisher to hand over any information to any other publisher. Under the statute, an affiliated directory publisher cannot require another directory publisher, whether affiliated or not, to sell SLI or value-added information derived from SLI. The obligation inures only to the LEC to provide

^{8/} YPPA notes that some affiliated directory publishers will often pay much more for listing information than independent directory publishers. This could be due to many factors, including, but not limited to: state regulations; contractual obligations; business decisions; and the need for value-added SLI products from the LEC.

SLI.^{9/} YPPA reiterates that section 222(e) does not call for the regulation of any directory publishing operation.

D. Interim Prices During the Pendency of a Complaint

ADP has asked that publishers be allowed to pay the benchmark prices during the pendency of a complaint filed under section 222(e). This strikes YPPA as a "guilty until proven innocent" approach. SLI costs are such a small percentage of the overall cost of producing a directory that it would be hard to justify this approach. Certainly, there would be no irreparable harm, as the money involved here is fairly small and could not possibly be the difference between a business failing or continuing to operate.^{10/}

E. Use of Accelerated Docket

ADP has asked that the Commission resolve SLI complaints using an accelerated docket. YPPA believes SLI complaints should be resolved expeditiously. The Commission

^{9/} This does not prevent any directory publisher from voluntarily selling SLI or any additional information to any other entity. These sales, however, are not only outside the scope of section 222(e), but outside the scope of the Communications Act.

^{10/} If, however, a directory publisher made a clear and convincing showing that paying the higher SLI prices would force it to close its doors, in the interest of fairness and justice, the Commission may wish to broker a temporary agreement between the parties to reduce the SLI rates pending the outcome of the complaint, so long the directory publisher is responsible for the difference in price should the rates be found reasonable.

must realize, however, by basing SLI prices solely on cost,^{11/} that cost studies will have to be performed. As the Commission knows, cost studies take time. Any accelerated docket treatment must provide for adequate time to conduct any necessary cost studies.

II. SUPPORT FOR PETITIONS FILED BY ALLTEL, BELL ATLANTIC, NATIONAL TELEPHONE COOPERATIVE ASSOCIATION AND US WEST

A. Contracts between Carriers and Publishers

Alltel requests that the Commission reconsider its decision to make contracts between a carrier and its affiliated publisher available to independent directory providers. The Commission imposed this requirement ostensibly to make certain that carriers are not discriminating between their own directory publishing affiliate and independent directory publishers.

YPPA agrees with Alltel that the Commission should reconsider this part of its decision. Such a practice is in contravention to all established business practices and puts the LEC's directory publishing affiliate at a disadvantage. The contractual arrangements between a LEC and an independent directory publisher are not subject to the same requirement. This requirement was not discussed until the Commission's Report and Order, so no parties had a chance to comment on this proposal.

^{11/} YPPA has contended in the past and continues to believe that the legislative history does not support basing SLI charges solely on costs. In fact, value, and not cost, is an appropriate measure for SLI pricing and is the only price guidance supported by the legislative history. See, *infra*, section II(D) at pages 10-11.

If the Commission needs to review the LEC's contracts with affiliated and unaffiliated LECs, the Commission can do so during a complaint proceeding, and can do so *in camera*, so that confidential and proprietary information remains confidential and proprietary.

B. Ability to Preempt Abusive Use of SLI

Bell Atlantic asks the Commission to reconsider its decision to require a LEC to sell SLI to an entity that the LEC believes will not use the SLI for the purpose of publishing a directory. The Commission stated that the LEC must obtain a determination that the entity does not intend to publish a directory before allowing the LEC to refuse to sell SLI to that entity.

This is definitely "closing the barn door after the horse has left." The Commission's decision means that any telemarketer, direct mailer, or other entity can obtain SLI and use it for any purpose until the LEC goes to the Commission for a determination. Even if the Commission determines that the entity is not using SLI for the purpose of publishing a directory, the Commission has no jurisdiction over the entity and cannot impose fines or penalties. The LEC's only option is to sue for breach of contract. The damage, however, has already been done. The SLI has already been used for other purposes and the customers' privacy has been compromised.

C. Changes from Published to Unpublished

Alltel, Bell Atlantic and US West ask the Commission to reconsider its decision to require a LEC to proactively notify any entity that purchases SLI from the LEC when a customer changes from published to unpublished. This is an additional obligation on the LEC that is wholly outside the scope of the statute and the proceeding.

In reality, most subscribers do not switch from published to unpublished without switching phone numbers, as well. Also, it is the job of the directory publisher to ensure that the information in its database is up-to-date. That process is usually accomplished by purchasing updates from the LEC. Most affiliated publishers purchase frequent updates to ensure that the information in their databases are accurate. All publishers should want to have timely and accurate information, and the Commission's rules provide for the ability to obtain accurate and timely information. There is no need to create this new (and potentially expensive) update product listing only this one type of change.

D. Benchmark Pricing

NTCA argues that small and rural telephone companies' costs are higher than their large urban counterparts, and therefore the four and six cents benchmarks should be considerably higher for those companies. YPPA is opposed to the Commission's benchmark proposal in general, and NTCA points out one of its many flaws. These prices are not based on the statutory requirements of the provision, nor on the realities of the directory publishing or local exchange business.

YPPA continues to believe that the best method for determining reasonable pricing is through the complaint process and not through a rulemaking process. A rulemaking, by its nature, is a one-size-fits-all. While YPPA understands the Commission's desire for simplicity and predictability, the business does not lend itself to such a solution. It is YPPA's understanding that several companies provided the Commission with cost data, and that the cost (not including profit or value) exceeds the four and six cent levels.

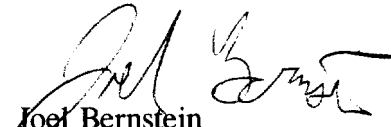
While YPPA supports the Commission's rejection of using incremental cost as the sole basis for reasonableness, YPPA believes the Commission's reasonableness factors fall short of the Congressional intention in this matter. YPPA believes that value must also be a factor.

The statute gives the Commission flexibility to determine whether subscriber listing rates are reasonable. Value of the information, however, was specifically enumerated by Congress as a factor in determining reasonableness. The House Commerce Committee Report makes it clear that the listing information has some market value, and telephone companies are permitted to charge for listings based on that value. The report states that the subscriber list information provisions ensure "that the telephone companies that gather and maintain such data are compensated for the value of the listings." H.R. Rpt. No. 104-204, Part I, 104th Cong., 1st Sess. at p. 89 (1995) (emphasis added). The Commission appears intent on ignoring this portion of the legislative history.

III. CONCLUSION

YPPA respectfully requests that the Commission, for the above stated reasons, deny ADP's Petition for Reconsideration, and grant the Petitions for Reconsideration filed by Alltel, Bell Atlantic, the National Telephone Cooperative Association and US West.

Sincerely,



Joel Bernstein
Counsel for YPPA

Halprin, Temple, Goodman and Maher
555 12th Street, N.W., Suite 950 North
Washington, DC 20004
(202)371-9100

CERTIFICATE OF SERVICE

I, Mary-Helen Dove, hereby certify that on this 11th day of January 2000, a copy of the Comments of the Yellow Pages Publishers Association on Petitions for Reconsideration, CC Docket No. 96-115, has been served by first-class mail, postage prepaid, this 11st day of January, 2000 upon the following:

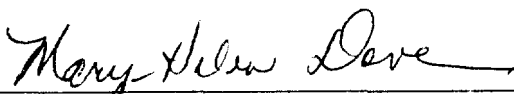
L. Marie Guillory
Daniel Mitchell
National Telephone Cooperative
Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Kathryn Marie Krause
U S West Communications, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Glenn S. Rabin
ALLTEL Services Corporation
Suite 720
601 Pennsylvania Avenue, N.W.
Washington, DC 20004

John M. Goodman
1300 I Street, N.W.
Washington, DC 20005
Attorney for Bell Atlantic

Philip L. Verveer
Theodore Whitehouse
Sophie J. Keefer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036-3384



Mary-Helen Dove